

This is a motion to set aside the default and the default judgment in an action alleging a breach of contract for the sale of muscat canelli grapes.

On March 21, 2008, Plaintiff served the complaint on Paula Cardoza at defendant Martin & Weyrich's place of business. On May 21, 2008, defendants' default was taken. On August 19, 2008, plaintiff procured a default judgment based upon affidavits supplied to the Court. On August 20, 2008, defendants filed a motion to set aside the default and default judgment.

The basis of defendants' motion is that they mistakenly believed that a default judgment would only be entered for the balance of the amount due on the grapes supplied in 2007. Theresa Corea, Vice President for Martin Weyrich Winery LLC, states that she believed that the complaint sought recovery of an outstanding balance due on an invoice for grapes that had been delivered. She did not intend to litigate because she expected that plaintiff would obtain a judgment for the outstanding balance due, which defendant expected to be under \$75,000.00. Corea was surprised to receive a request for entry of judgment in the amount of \$256,400.90. She states that her failure to retain counsel was based on a misunderstanding of what was being sought in the complaint.

The complaint alleges damages in the sum of \$238,000.00 for the 2007 crop. There are no specific damage amounts claimed for the 2008 and 2009 crop in the body of the complaint or its prayer. Rather, the complaint alleges that, because of the repudiation of the remaining three year term of the contract, plaintiff suffered damages in the form of costs of contracts with growers for the production of grapes in an amount according to proof. *See* ¶12.

On the other hand, the affidavit in support of the default judgment claims anticipated lost profit damages in the approximate amount of \$216,000.00 for the harvest years of 2008 and 2009. There is nothing in the affidavit that accounts for potential sales to third parties or other efforts to mitigate damages. It is conceivable that plaintiff would receive a windfall if it sold those grapes to a third party in the 2008 and 2009 harvest years.

Defendant has cited no authority to support the proposition that a conscious decision not to respond to a complaint can constitute mistake, inadvertence or excusable neglect under CCP §473. There was no mistake or excusable neglect in defendant's conscious decision to allow its default to be taken. Moreover, defendant's claim of inadvertence is suspect. Defendant was obviously aware that a considerable judgment was being requested since the complaint contained a claim for \$238,000.00 based on the 2007 harvest alone.

In any event, the default judgment exceeds the amount prayed for in the complaint. With actions for money damages, a default judgment is limited to the amount demanded in the complaint. *Weil & Brown, Civil Procedure Before Trial*, (Rutter Group 2008) §5:237. General demands in the prayer do not provide adequate notice of the relief sought to

support a default judgment. Weil & Brown, *Civil Procedure Before Trial*, (Rutter Group 2008) §5:242.

Accordingly, the Court grants relief from the default judgment. Plaintiff will need to schedule a prove-up hearing. A defaulting defendant has no right to participate at the prove-up hearing in an attempt to block entry of the default judgment. Weil & Brown, *Civil Procedure Before Trial* (Rutter Group 2008) § 5.6. At the prove-up hearing, the Court will be required to act as the “gatekeeper” insuring that only appropriate claims are awarded. Weil & Brown, *Civil Procedure Before Trial* (Rutter Group 2008) §5:201.